

United States District Court

For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 TERARECON, INC.,

No. C 05-4407 CW

12 Plaintiff,

13 v.

14 FOVIA, INC.; FOVIA MEDICAL, INC.;
KENNETH FINEMAN; ROGER KATEN; GEORGE
15 BUYANOVSKY; IGOR OKULIST; and JOSEF
GOREK,

ORDER GRANTING
COUNTERDEFENDANTS'
MOTION TO DISMISS
SECOND AMENDED
COUNTERCLAIMS IN
PART AND DENYING
IT IN PART

16 Defendants.

17 _____/
18 FOVIA, INC.; FOVIA MEDICAL, INC.; and
19 GEORGE BUYANOVSKY,

20 Counterclaimants,

21 v.

22 TERARECON, INC., MOTOAKI SAITO; and
ROBERT TAYLOR,

23 Counterdefendants.

24 _____/
25 Counterdefendants TeraRecon, Inc., Motokai Saito and Robert
26 Taylor move to dismiss, pursuant to Federal Rule of Civil Procedure
27 12(b)(6), the second, third and fourth claims for relief of the

1 second amended counterclaim filed by Counterclaimants Fovia, Inc.
2 and Fovia Medical, Inc. (collectively, Fovia) and George
3 Buyanovsky.¹ Fovia opposes this motion. The matter was decided on
4 the papers. Having considered all of the papers filed by the
5 parties, the Court grants in part the TeraRecon parties' motion to
6 dismiss and denies it in part.

7 BACKGROUND

8 As explained in the Court's July 6, 2006 order, TeraRecon
9 brought this action against its competitor Fovia and the individual
10 Defendants who founded Fovia. Fovia and Buyanovsky, a former
11 TeraRecon employee and one of the individual Defendants, filed a
12 counterclaim against TeraRecon and two additional
13 counterdefendants: Mitoaki Saito, TeraRecon's Chief Executive
14 Officer, and Robert Taylor, TeraRecon's Chief Operating Officer.
15 The counterclaim was for copyright infringement, unfair business
16 practices, intentional interference with prospective economic
17 advantage and negligent interference with prospective economic
18 advantage.

19 The TeraRecon parties moved to dismiss the second, third and
20 fourth claims of the counterclaim. After they filed their motion
21 to dismiss, Fovia filed a stipulation and proposed order granting
22 them leave to file their first amended counterclaim. The Court
23 signed the proposed order. The TeraRecon parties argued that, even
24 after amending their counterclaim, Fovia's second, third and fourth

25
26 ¹The TeraRecon parties do not move to dismiss the first
27 counterclaim for copyright infringement brought by Buyanovsky and
Fovia. The second, third and fourth counterclaims are brought by
Fovia alone.

1 causes of action failed to state claims upon which relief could be
2 granted. The Court agreed, and, on July 6, 2006, it dismissed with
3 leave to amend the second, third and fourth claims.

4 On July 20, 2006, Fovia and Buyanovsky filed their second
5 amended counterclaim. The TeraRecon parties again move to dismiss
6 the second, third and fourth claims brought by Fovia.

7 **LEGAL STANDARD**

8 **I. Motion to Dismiss**

9 A motion to dismiss for failure to state a claim will be
10 denied unless it is "clear that no relief could be granted under
11 any set of facts that could be proved consistent with the
12 allegations." Falkowski v. Imation Corp., 309 F.3d 1123, 1132 (9th
13 Cir. 2002), citing Swierkiewicz v. Sorema N.A., 534 U.S. 506
14 (2002). All material allegations in the complaint will be taken as
15 true and construed in the light most favorable to the claimant. NL
16 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

17 A complaint must contain a "short and plain statement of the
18 claim showing that the pleader is entitled to relief." Fed. R.
19 Civ. P. 8(a). "Each averment of a pleading shall be simple,
20 concise, and direct. No technical forms of pleading or motions are
21 required." Fed. R. Civ. P. 8(e). In all averments of fraud or
22 mistake, however, the circumstances constituting fraud or mistake
23 must be stated with particularity. Fed. R. Civ. P. 9(b). The
24 allegations must be "specific enough to give defendants notice of
25 the particular misconduct which is alleged to constitute the fraud
26 charged so that they can defend against the charge and not just
27 deny that they have done anything wrong." Semege v. Weidner, 780

1 F.2d 727, 731 (9th Cir. 1985). These rules "do not require a
2 claimant to set out in detail the facts upon which he bases his
3 claim. To the contrary, all the Rules require is 'a short and
4 plain statement of the claim' that will give the defendant fair
5 notice of what the plaintiff's claim is and the grounds on which it
6 rests." Conley v. Gibson, 355 U.S. 41, 47 (1957).

7 When granting a motion to dismiss, a court is generally
8 required to grant a plaintiff, or counterclaimant, leave to amend,
9 even if no request to amend the pleading was made, unless amendment
10 would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection
11 Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining
12 whether amendment would be futile, a court examines whether the
13 complaint could be amended to cure the defect requiring dismissal
14 "without contradicting any of the allegations of [the] original
15 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
16 Cir. 1990). Leave to amend should be liberally granted, but an
17 amended complaint cannot allege facts inconsistent with the
18 challenged pleading. Id. at 296-97.

19 DISCUSSION

20 Fovia's second claim is for intentional interference with
21 prospective economic advantage; its third claim is for negligent
22 interference with prospective economic advantage. The fourth claim
23 is for unfair business practices in violation of California
24 Business and Professions Code § 17200. The TeraRecon parties
25 contend that all three causes of action fail to state a claim upon
26 which relief may be granted and should be dismissed without leave
27 to amend.

1 I. Intentional Interference with Prospective Economic Advantage
2 The Court dismissed this claim with leave to amend. Fovia,
3 however, did not amend its intentional interference claim.
4 Instead, it states in its opposition that it stands on this
5 counterclaim as previously plead. It argues that the underlying
6 facts of this claim are not subject to Federal Rule of Civil
7 Procedure 9(b), an argument the Court has already rejected.

8 As the Court explained in its prior order, Vess v. Ciba-Geigy
9 Corp. USA, 317 F.3d 1097 (9th Cir. 2003), is controlling. Under
10 Vess, even where fraud is not a necessary element of a claim,
11 allegations of fraudulent conduct must satisfy the heightened
12 pleading requirement of Rule 9(b). If they do not, then the
13 allegations of fraudulent conduct must be disregarded. 317 F.3d at
14 1105.

15 Fovia states that it does not aver fraud. But, as noted
16 above, it did not change its allegations in this claim. The Court
17 has already found that the allegations of "false and misleading
18 statements" and misrepresentations by the TeraRecon parties to
19 Fovia's prospective customers are allegations of fraudulent
20 conduct. See Meridian Project Systems, Inc. v. Hardin Construction
21 Co., 404 F. Supp. 2d 1214, 1219 (E.D. Cal. 2005) ("It is well-
22 settled in the Ninth Circuit that misrepresentation claims are a
23 species of fraud, which must meet Rule 9(b)'s particularity
24 requirement.").

25 Because the false and misleading statements and
26 misrepresentations are not plead with particularity, the Court must
27 again disregard them. This leaves only the allegation that the
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1 TeraRecon parties intentionally interfered with Fovia's prospective
2 business relationship "through improper means." The Court again
3 finds that Fovia fails to provide the TeraRecon parties fair notice
4 of what their claim is and the grounds on which it rests. The
5 Court has already given Fovia a chance to replead this claim.
6 Fovia did not. The Court dismisses the second amended counterclaim
7 for intentional interference without leave to amend.

8 II. Negligent Interference with Prospective Economic Advantage

9 Fovia likewise did not amend its third claim for negligent
10 interference with prospective economic advantage, except to add
11 Saito and Taylor as individual Counterdefendants on that claim.
12 Fovia now states that it did not intend to assert this claim
13 against Saito or Taylor; the two names were added due to a
14 typographical error. Therefore, the Court dismisses without leave
15 to amend the third claim against Saito and Taylor. The Court also
16 dismisses without leave to amend the third claim against TeraRecon.

17 As Fovia notes, the TeraRecon parties did not raise Vess until
18 their reply. At the hearing, Fovia argued that Vess does not apply
19 to claims for innocent or negligent misrepresentations, which it
20 contends are at the heart of its negligent interference claim. See
21 Vess, 317 F.3d at 1105 ("The only consequence of a holding that
22 Rule 9(b) is violated with respect to a § 11 claim would be that
23 any allegations of fraud would be stripped from the claim. The
24 allegations of innocent or negligent misrepresentation, which are
25 at the heart of a § 11 claim, would survive."). The Court,
26 however, found that Fovia's negligent interference claim, like the
27 intentional interference claim, was based on TeraRecon's alleged

1 misleading statements to prospective customers and TeraRecon's
2 alleged misrepresentations concerning its rights in the engine
3 created by Buyanovsky.

4 In its current opposition, Fovia points out that, in its
5 negligent interference claim, it does not allege that TeraRecon
6 made false statements; Fovia alleges only that TeraRecon made
7 misleading statements to Fovia's customers, that Fovia copied
8 TeraRecon's software, and misrepresentations relating to
9 TeraRecon's rights to the engine. Fovia argues that the Ninth
10 Circuit acknowledged in Vess that alleging misrepresentation is not
11 tantamount to alleging fraud. Fovia, however, fails to provide a
12 citation to such an acknowledgment in Vess. Nor does it provide
13 any other case supporting its position.

14 As the TeraRecon parties note, many courts have found that
15 negligent misrepresentation claims are subject to the heightened
16 pleading requirements of Rule 9(b). See, e.g., Scognamillo v.
17 Credit Suisse First Boston LLC, 2005 WL 645446, *6 (N.D. Cal.
18 2005); Neilson v. Union Bank, 290 F. Supp. 2d 1101, 1141 (C.D. Cal.
19 2003) (noting that, under California law, negligent
20 misrepresentation is a form of deceit). They also cite Benchmark
21 Electronics, Inc. v. J.M. Huber Corp., 343 F.3d 719, 723 (5th Cir.
22 2003), finding that the heightened pleading requirement is applied
23 to a negligent misrepresentation claim when that claim is based on
24 the same underlying facts as a fraud claim. The TeraRecon parties
25 argue that, because the underlying facts of the intentional and
26 negligent interference claims are the same, those underlying facts
27 must be plead in accordance with Rule 9(b). The TeraRecon parties

1 neglect to mention the one difference in the alleged underlying
2 facts: in its negligent interruption claim, Fovia does not allege
3 that the misleading statements were false. Nonetheless,
4 subtracting an adjective does not alter the underlying factual
5 allegations, nor does it free Fovia from complying with the
6 specificity required by Rule 9(b). There may be situations where
7 alleging a misrepresentation or misleading statement is not
8 tantamount to alleging fraudulent conduct; this, however, is not
9 one of those situations.

10 Because Fovia's allegations involving fraudulent conduct,
11 i.e., the misleading statements and misrepresentations, must be
12 disregarded, Fovia again is left with nothing more than stating
13 that TeraRecon has negligently interfered with Fovia and Fovia
14 Medical's prospective business relationships. As the Court stated
15 in its prior order, conclusory allegations are insufficient to
16 defeat a motion to dismiss for failure to state a claim. Epstein
17 v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996). Thus,
18 this claim is dismissed without leave to amend.

19 IV. Unfair Business Practices in Violation of California Business
20 and Professions Code § 17200

21 Unlike its second and third counterclaims, Fovia amended its
22 fourth counterclaim for unfair business practices. Fovia states
23 that it cured the alleged defects in this counterclaim by
24 (1) incorporating its allegations of interference with prospective
25 economic advantage; (2) setting forth in detail the false promises
26 Saito and TeraRecon made to Buyanovksy; and (3) alleging bodily
27 appropriation of the engine, an extra element of the unfair
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1 business practices claim that distinguishes it from the copyright
2 infringement claim. Fovia argues that each of these amendments
3 provides an independent basis for denying the motion to dismiss.
4 The TeraRecon parties disagree.

5 A. Incorporation of Interference Claims

6 The Court dismisses the claims for intentional and negligent
7 interference with prospective economic advantage. Therefore, those
8 claims do not support a claim for unfair business practices.

9 B. False Promises

10 As discussed in the Court's prior order, the Copyright Act
11 preempts State law claims for unfair competition arising out of
12 conduct encompassed by the Copyright Act, unless the State law
13 claims include an additional element that makes the right asserted
14 qualitatively different from those protected under the Copyright
15 Act. Altera Corp. v. Clear Logic, Inc., 424 F.3d 1079, 1089 (9th
16 Cir. 2005). Fovia now includes that additional element. It
17 alleges in sufficient particularity that Saito and TeraRecon made
18 false promises and misrepresentations. Firoozye v. Earthlink
19 Network, 153 F. Supp. 2d 1115, 1129 (N.D. Cal. 2001) ("A state-law
20 misrepresentation claim, even where the defendant's only alleged
21 misrepresentation involved a promise not to use the plaintiff's
22 work, contains an additional element that makes the claim
23 qualitatively different from a copyright right [sic] claim and is
24 therefore not preempted.").

25 The TeraRecon parties argue that the false promise allegations
26 do not rescue this claim. They note that the alleged false
27 promises and misrepresentations were made to Buyanovksy, years
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1 before Fovia came into existence. They therefore contend that
2 Fovia cannot bring this claim. But, as Fovia notes, the TeraRecon
3 parties cite no authority to suggest that Fovia, the company
4 Buyanovsky founded, and to which he assigned all rights, cannot
5 have suffered injury from these misrepresentations and false
6 promises and cannot bring this claim.

7 The Court finds that the allegations of false promises provide
8 grounds for maintaining this claim against TeraRecon and Saito; the
9 allegations, however, do not save the claim against Taylor.

10 C. Bodily Appropriation of the Engine

11 In its July 6, 2006 order, the Court determined that, to the
12 extent Fovia based its unfair business practice claim on a reverse
13 passing-off claim, the unfair business practice claim was
14 preempted. As stated in Aagard v. Palomar Builders, Inc., 344 F.
15 Supp. 2d 1211, 1217 (E.D. Cal. 2004), "Reverse palming off claims
16 are preempted unless they allege bodily appropriation and the
17 claimant seeks more than mere monetary damages." In its first
18 amended counterclaim Fovia did not allege bodily appropriation.
19 Now, it does. The TeraRecon parties argument otherwise is
20 unavailing.

21 The Court finds that this allegation provides additional
22 grounds for maintaining the fourth claim against TeraRecon and
23 Saito. In addition, this allegation provides grounds for
24 maintaining this claim against Taylor.

25 CONCLUSION

26 For the foregoing reasons, the Court GRANTS IN PART the
27 TeraRecon parties' Motion to Dismiss Second Amended Counterclaims

1 (Docket No. 61) and DENIES it IN PART. The Court dismisses without
2 leave to amend Fovia's second and third claims for intentional and
3 negligent interference with prospective economic advantage; Fovia's
4 fourth claim for unfair business practices is not dismissed.

5 IT IS SO ORDERED.

6
7 Dated: 9/20/06


8 CLAUDIA WILKEN
9 United States District Judge